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Supreme Court, U.S.
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No. 02-686

In the
Supreme Court of the United States

STEVEN PRESCOTT, ET AL.,
Petitioners,

v.

COUNTY OF EL DORADO, CALIFORNIA, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Do agency fee payers who have standing to challenge the adequacy of the notice sent them by the union pursuant to *Chicago Teachers Union, Local No. 1, AFL-CIO v. Hudson*, 475 U.S. 292 (1986), also have standing to challenge the validity of the third-party indemnity agreement between their public employer and the union?

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STATEMENT OF THE CASE

This case is the outcome of a remand order by this Court to the Ninth Circuit that it take another look at its decision in *Prescott v. County of El Dorado*, 177 F.3d 1102 (9th Cir. 1999) (*Prescott I*) (Pet. at 20a). (See *Prescott v. County of El Dorado*, 528 U.S. 1111 (2000).) That decision held, per Judge Fernandez, that with respect to the issue presented here again "insofar as [petitioner agency fee payer] Prescott attacks the indemnification provision between the [respondent union] and the County, standing is in question. We review standing questions de novo." (*Prescott I*, *supra*, Pet. at 20a.)

The Ninth Circuit's de novo review upheld the district court's opinion that petitioner lacked standing to challenge the indemnification agreement between the county and the union. Petitioners argued that this agreement obligating the union to indemnify the county "from any liability which arises out of deductions of fees from employee wages, and to provide a defense against any claims," was, if not unconstitutional, void for public policy. But the Ninth Circuit never reached that issue on the merits, finding instead that the petitioner agency fee payers lacked standing to challenge the agreement. It reached that conclusion by reasoning that

> While it can be assumed that Prescott suffered some injury when the fees were deducted from his paycheck, that is all he has shown. He certainly cannot show any connection between the indemnification agreement and that injury. The agreement does no more than place the ultimate cost of any impropriety in the notice and the procedures where it belongs—on the union, which seeks the fees. Just how any

> injury can be traced to the indemnification provision itself is entirely unclear, but for Prescott's claim that the provision will somehow cause the County to ignore its own duties. But that argument is no more than rank speculation, and any breach of the County's duty can hardly be said to be traceable to the indemnification provision itself.

(*Prescott I*, supra, Pet. at 42a.)

The Court directed the Ninth Circuit to reexamine and reconsider its decision in light of the Court's recent holding in *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) (*FOE*). The Ninth Circuit understood *FOE* to be "a standing case" and, since "the only portion of its decision that dealt with standing . . . discussed the issue of indemnification," interpreted the remand to require the district court to "address the standing issue in the first instance." (Pet. at 21a.)

The district court reconsidered the standing issue and concluded that petitioners "failed to demonstrate how the remedy they seek will prevent any future violation of their rights under *Hudson*. Although [they] may have suffered a violation of the standards enunciated in *Hudson*, that injury resulted from the Union's conduct, and, notwithstanding the defendants' stipulation, the hold harmless agreement is a cause of the injury only in the most indirect fashion." (Pet. at 16a.)

The district court discussed *FOE* and concluded that it did not alter its conclusion because "the injury suffered by the organization members in [*FOE*] could have been redressed by a favorable decision, [while] the same is not true in this case

with respect to [petitioners'] challenge to a third-party indemnity agreement." (Pet. at 17a.)

On appeal, the Ninth Circuit agreed for the second time with the district court, albeit for different reasons, that petitioners lacked standing to challenge the indemnity agreement between the county and the union. This time Chief Justice Schroeder expressly found that petitioners failed to demonstrate either the requisite causation or redressability elements of standing. As to causation, the opinion stated:

> [Petitioners' *Hudson*] injury was not caused by the employer's entry into the collective bargaining agreement; it was caused by the union's inadequate notice of expenditures on which the agency fees were based. Indeed, in this circuit, the employer has no responsibility for ensuring the adequacy of the notice; that is the union's responsibility. *Foster v.Mahdesian*, 268 F.3d 689, 694 (9th Cir. 2001); *Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 817 (9th Cir. 1997). The challenged indemnification clause upon which the employer issued caused neither the union to furnish, nor the plaintiffs to receive, inadequate notice.

(*Prescott v. County of El Dorado*, 298 F.3d 844 (9th Cir. 2002) (*Prescott II*)) (Pet. at 4a.)

The Ninth Circuit also agreed with the district court that petitioners did not meet the redressability requirement for standing because "the remedy [they] seek, invalidation of the indemnity clause, does not compensate [them] for past

violations of *Hudson*, nor does it prevent future violations." (*Id.*)

It is from this opinion of the Ninth Circuit that petitioners seek certiorari review.

STATEMENT OF FACTS

Respondents respectfully refer the Court to the factual statements presented by the Ninth Circuit in its two opinions (Pet. at App. A & E, pp. 1a-5a and 22a et. seq.) for an objective statement of the pertinent background animating its most recent decision challenged by petitioners. We also add this disclaimer to petitioners' parsing of the issues presented:

The Court has been up this down staircase once before—when it remanded the case for reconsideration of whether agency fee payers had standing to challenge the indemnification clause of the collective bargaining agreement between the County of El Dorado and the union representing the county's employees. (Pet. at 3, citing to *Prescott v. County of El Dorado*, 528 U.S. 1111 (2000).) The result of that remand is now complete and presented anew for this Court to review again; but petitioners are wrong in their assertion that, beyond the narrow standing issue over the indemnification agreement for which remand was ordered, this case presents the larger issue of whether petitioners have standing to "challenge provisions of the agreement governing their terms and conditions of employment." (Pet. at i, 3.) Of course they do or do not, depending upon what "terms and conditions" of their employment we are talking about. Petitioners' broad phrasing of this phantom "standing" issue as one pertaining to their "their terms and conditions of employment" is too general to be of assistance to the Court or counsel trying to wrestle with pertinent jurisprudential

authority. It reflects, if not a peculiar ideological view of labor relations and constitutional law, an understandable penchant to make narrow, fact specific legal issues into more grandiose ones; and is analogous, and about as helpful to the question of justiciability, as saying (which is perhaps true in an ontological sense) that this case concerns the right of public employees to associate together and bargain collectively for the improvement of their working conditions without having to subsidize "free riders."

That narrow, properly framed legal issues can be, as petitioners have done here, extrapolated into more global ones for various purposes is commonly recognized, but doing so properly consigns their resolution to the political process, not to the federal courts. Only one issue is really presented by this case, and that is whether agency fee payers who have undisputed standing to challenge the adequacy of the *Hudson* notice they receive from the union, also have standing to challenge the validity of the indemnity agreement between the union and their public employer. That standing issue turns, to be sure, on the nature of petitioners' "injury," which this Court has defined and confined to the adequacy of the "notice" it requires the union to give agency fee payers, and whether the challenge to that "injury" can satisfy the requirements of traceability (i.e., legal causation) and redressability.

Mischaracterizing their purported "injury" as something other than what this Court and others have said it is – whether that be called the "seizure" of their property in the form of their fair share of agency fees by the employer, or their deprivation of standing to challenge, as they put it, that "section of the MOU [i.e., the indemnity provision]

governing their terms and conditions of employment"[1] – should not suffice to achieve certiorari. This Court should not, in other words, countenance the evasion of its holdings by a litigant's mislabeling of the nature of the injury implicated.

SUMMARY OF ARGUMENT

Two elements essential to show that petitioner agency fee payers have the standing essential to challenge the validity of the indemnification agreement between the union and the county are *causation* and *redressability*. Both are lacking here.

Petitioners cannot show the necessary causal link between their injury in fact – i.e., collection of their fair share fees by the public employer absent an adequate *Hudson* notice to them from the union – and the indemnification agreement between the union and petitioners' employer. The relationship between the injury and the indemnity agreement is too attenuated to conclude anything reasonable respecting legal cause. Petitioners fear that the indemnification agreement induces the county to act illegally with respect to petitioners' rights is just that, fear driving speculation in a vicious circle that ignores fact and logic. That the county stipulated it would not have entered into the fair share agreement without the indemnification guarantee from the union proves nothing because all elements of an agreement are indispensable to it as a whole; it can be safely said about each and every element that absent it there would be no agreement.

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[1] Pet. at 3.

Nor can petitioners meet the redressability requirement of standing because the remedy they seek, invalidation of the indemnity clause, does not compensate them for past violations of *Hudson*, nor prevent future violations.

No conflict exists between this Court's opinion in *Hudson* and the Ninth Circuit opinions in this case and others upon which it relies, namely *Foster* and *Knight*. Neither is there any meaningful conflict between the appellate opinion here and decisions of the Third and Sixth Circuits concerning standing of agency fee payers to challenge the validity of indemnification agreements between a union and the public employer of the fee payers. To the extent there may exist a conflict between the decision in this case and the Tenth Circuit's recent opinion in *Wessel v. City of Albuquerque*, 299 F.3d 1165, it is not sufficiently deep to warrant review now instead of letting the decisions percolate in the lower courts for a reasonable period to see if any differences between the two opinions can be ironed out or clarified.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH OPINIONS OF THIS COURT; AND PETITIONERS' MISLABELING OF THEIR "INJURY" FOR THE PURPOSE OF MANUFACTURING AN APPARENT CONFLICT WILL NOT WASH.

Petitioners disagree with the district and appellate courts' identification of their purported injury, which is the union's failure to provide them with adequate notice of the basis of the agency fee and to maintain a sufficient portion of collected fees in escrow pending fee arbitration (*see* Pet. at 3a), both of which are required by *Chicago Teachers Union,*

Local No. 1 v. Hudson, 475 U.S. 292 (1986). They claim that their real injury is *not* the union's failure to comply with *Hudson*, for which they obtained redress, but the public employer's withholding of agency fees.

But as *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232 (1977) makes clear, the First Amendment is not violated by the implementation of an agency fee agreement – i.e., "to require nonunion employees, as a condition of employment, *to pay* a fair share of the union's cost of negotiating and administering a collective-bargaining agreement." (*Hudson*, 475 U.S. at 301 (emphasis added).) Rather, the only reason that the petitioners can claim *any* injury in the present case is because (as the Court of Appeals held in its first decision in this case) the union failed to comply fully with *Hudson*. Their injury, then, arises from the union's inadequate compliance, and the standing inquiry turns on the second and third prongs of the standard this Court articulated in such cases as *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560-61 (1992), and *Allen v. Wright*, 468 U.S. 737, 751 (1984) – i.e., whether they have (1) demonstrated the necessary causal link between the conduct they seek to challenge (the indemnification agreement) and their injury, and (2) whether they have demonstrated that the remedy they seek (invalidating the indemnification agreement) will redress their injury.

A. Petitioners Presented No Proof that the Indemnification Agreement between the Union and the Public Employer was the Legal "Cause" of any Inadequacy in the Union's *Hudson* Notice.

Petitioners misconstrue the nature of their "injury" to avoid addressing the real standing issues presented of causation and redressability. It is on the basis of these two

issues that the appellate opinion held petitioners lacked standing (see Pet. at 3a-5a); and as to those issues, the court was correct.

Thus, the Court of Appeals correctly rejected petitioners' argument that they could establish the requisite causal relationship merely by showing "but-for" causation based on a stipulation that the public employer would not have entered into the agency fee agreement absent the indemnification provision. This Court has previously held in the Section 1983 context that such "but-for" causation arguments are too attenuated to establish causation:

> [S]ome limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in *Monell* will become a dead letter. Obviously, if one retreats far enough from a constitutional violation some municipal "policy" can be identified behind almost any such harm inflicted by a municipal official; for example, [the accused officer] would never have killed Tuttle if Oklahoma City did not have a "policy" of establishing a police force. But *Monell* must be taken to require proof of a city policy different in kind from this latter example before a claim can be sent to a jury on the theory that a particular violation was "caused" by the municipal "policy." At the very least there must be an affirmative link between the policy and the particular constitutional violation alleged.

(City of Oklahoma v. Tuttle, 471 U.S. 808, 823 (1985) (plurality opinion).)[2]

The same reasoning applies equally in the context of standing. (*See Huddy v. Federal Communications Commission*, 236 F.3d 720, 735 (D. C. Cir. 2001) (rejecting "but-for" approach to standing where there was no "inherent tendency of the [defendant]'s alleged error to produce the alleged injury," and questioning whether "'but for' causation of this sort could ever be sufficient to confer constitutional standing"); *Florida Audobon Society*, 94 F.3d 658, 670 (D.C. Cir. 1996) (*en banc*) (holding that "a protracted chain of causation fails both because of the uncertainty of several individual links and because of the number of speculative links that must hold for the chain to connect the challenged acts to the asserted particularized injury").)[3]

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[2] Although this passage is found in a section of *Tuttle* that was joined by only four justices, the Court subsequently quoted the language with approval. *See City of Canton, Ohio v. Harris*, 489 U. S. 378, 390 n. 9 (1989). Moreover, the author of the opinion of three other justices in *Tuttle* later clarified that "both the plurality and the opinion concurring in the judgment [in *Tuttle*] found plaintiff's submission inadequate because she failed to establish that the unconstitutional act was taken *pursuant to* a municipal policy rather than simply resulting from such a policy in a 'but for' sense." *Pembaur v. City of Cincinnati*, 475 U. S. 469, 484 n. 11 (1986) (plurality opinion of Brennan, J.) (emphasis in original).

[3] *See also Camden County Board of Chosen Freeholders v. Beretta USA Corp.*, 123 F. Supp. 2d 245, 257 (D.N.J. 2000) (rejecting "but-for" approach to standing and holding that, "[a]lthough proximate cause is not typically part of the constitutional standing analysis, the proximate cause approach is warranted where, as here, the plaintiff's theory of liability involves suing a defendant

Petitioners' "but-for" causation analysis – reminiscent of a Rube Goldberg contraption – is simply too attenuated and speculative to support standing in the instant case. For example, if such a "but-for" causation theory were sufficient, fee payers would have standing (assuming they could show redressability) to challenge the union's or public employer's very existence as *ultra vires*, on the theory that if the union or public employer did not exist there would be no agency fee agreement. This sort of *reductio ad absurdum* causation analysis would permit courts and counsel to foresee forever, rendering the principle of causation uncabined and unconfined.

The Court of Appeals' rejection of petitioners' other "causation" argument – that the indemnification provision removed the public employer's incentive to police the union's compliance with the *Hudson* notice requirements – was also manifestly correct because petitioners introduced no *evidence* to support their argument, but rather relied solely on speculation which is insufficient to sustain their burden of proof. (*See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U. S. 26, 42-45 (1976).) In *Simon*, this Court held that the plaintiffs lacked standing to challenge favorable tax treatment to hospitals that denied non-emergency services to indigents. Although the Court assumed that the plaintiffs had been injured by the denial of hospital service, it rejected their arguments that the revenue ruling had "'encouraged' hospitals to deny services to indigents" and that requiring hospitals to offer non-emergency service to indigents to obtain the tax break "would 'discourage' hospitals from denying" such service. (*Id.* at 42.) The Court reasoned

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over allegedly wrongful conduct several steps removed from the end harm").

that, regardless of the tax consequences, the decision whether to provide non-emergency care to indigents would rest with hospitals, who might instead "elect to forgo favorable tax treatment." (*Id.* at 42-43.) It therefore concluded that "[s]peculative inferences" that different tax incentives would change the hospitals' behavior "will not suffice to invoke the federal judicial power." (*Id.* at 44-45.)[4]

Here, as noted above, petitioners introduced no evidence to support their speculation that the public employer knew that the union's *Hudson* notice was legally deficient, yet continued to deduct agency fees *because* the indemnification provision shielded it from liability. (*See* Pet. at 5-6.) The stipulation that the public employer would not have entered into or enforced the agency fee agreement absent an indemnification agreement is much too general to prove petitioners' contention, as it does *not* state that the public employer was aware that the union's *Hudson* notice was legally deficient, yet continued to deduct fees in *reliance* on the indemnification provision.

Moreover, the stipulation makes the instant case an extremely poor vehicle to resolve the issue of the standing of fee payers to challenge agency fee indemnification agreements because the very existence of the stipulation renders this case *sui generis*. The dynamic, give-and-take nature of collective bargaining makes it extremely difficult to predict with certainty the effect that the omission of one element of an

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[4] *See also Florida Audobon Society*, 94 F.3d at 670 (where, as here, causation depends upon a chain of inferences regarding the likely effects of the conduct of independent actors, courts "routinely refuse to permit . . . predictive assumptions," which "cannot be easily described as true or false," "to establish standing").

agreement would have upon other provisions. If they were unable to offer a public employer an indemnification provision in return for an agency fee agreement, most unions would likely offer other concessions. In such cases, it is impossible to predict whether an employer would agree to an agency fee arrangement without indemnification, because it would depend on the nature of such other concessions and their importance to the employer.

B. Petitioners Did Not and Cannot Satisfy the "Redressability" Element Necessary to Show They Have Standing to Challenge the Indemnification Clause.

The Court of Appeals' decision was equally correct as to the "redressability" prong of the standing inquiry. As the Court of Appeals held,

> Redressability requires that it be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." [*Friends of the Earth, Inc. v.*] *Laidlaw* [*Environmental Svcs. (TOC), Inc.*], 528 U.S. [167] at 181, 120 S.Ct. 693 [(2000)]. The remedy the plaintiffs seek, invalidation of the indemnification clause, does not compensate plaintiffs for past violations of *Hudson*, nor does it prevent future violations.

(Pet. at 4a.)

Certainly, invalidating the indemnification agreement is prospective relief and would not remedy any *past* injury the petitioners have incurred. At no point in the litigation did petitioners seek an order requiring the public employer or its

attorney to *repay* to the union (much less to the petitioners) any funds it had received pursuant to the indemnification agreement. Moreover, the union settled the monetary aspects of this case by refunding to the petitioners *all* of the agency fees they paid during the relevant period. Since they have already received a full refund of their fees, the invalidation of the indemnification provision cannot redress their past injury – which has already been fully redressed by the refund. Similarly, petitioners introduced no evidence to demonstrate that the violations found by the courts below, i.e., the union's failure to comply with its obligations under *Hudson*, were likely to be repeated in the future, much less that invalidation of the indemnification provision would likely be effective in preventing the repetition of such violations. Again, petitioners' argument was founded on nothing more than *speculation* as to the possible effect of the indemnification agreement.

C. Petitioners' Mislabeling of their Purported Injury is a Veiled Attempt to Get this Court to Review Another Recent Case for which Certiorari was Denied, *Foster v. Madhesian*, and Should be Repelled.

The Petition, then, is really about something besides the Court of Appeals' decision. What petitioners really seek is to avoid litigating the causation and redressability questions that the Court of Appeals grounded its decision upon, and instead relitigate the Court of Appeals' prior decision in *Foster*, 268 F.3d 689, as to which this Court recently *denied* a petition for *certiorari*. (122 S. Ct. 2327.) There is, however, no compelling reason for this Court to grant the petition in the instant case, given its denial of the petition in *Foster*.

Foster examined the issue of under what circumstances a public employer could be held liable for the union's failure to comply with its obligations under *Hudson*. *Foster* concluded that the employer does *not* incur such liability merely for making a routine payroll deduction for agency fees, as long as there is a plan in place for *Hudson* compliance, even if the union's *Hudson* compliance is deficient. In other words, under *Foster*, (1) the public employer does not have a legal obligation to police the intricate details of the union's implementation of its *Hudson* compliance plan, as long as there is such a plan in place, and (2) if there is such a plan, the public employer does not incur any such duty merely by making a routine payroll deduction for agency fees. (*See Foster*, 268 F.3d at 693-94.)

The *Foster* plaintiffs did not agree with the Court of Appeals' decision in that case and they filed a petition for a writ of *certiorari*. In their writ petition, the *Foster* plaintiffs contended that the Court of Appeals' decision conflicted with *Hudson*, as well as with the other Court of Appeals' decisions relied on by petitioners here – *Hohe*, *Tierney* and *Weaver*. (*See* Petition Writ of *Certiorari* filed in No. 01-1307.)[5] This Court, however, determined that there was nothing in *Foster* that merited review.

Petitioners in this case – who are represented by a staff attorney at the National Right to Work Legal Defense Foundation, Inc. (as were the *Foster* plaintiffs) – are really

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[5] The *Foster* plaintiffs did not raise *Wessel v. City of Albuquerque*, 299 F.3d 1186 (10th Cir. 2002), since that decision had not been rendered at the time they filed their *cert.* petition. There can be no argument, however, that *Wessel* conflicts with *Foster*, since the *Wessel* court expressly distinguished *Foster* rather than disagreeing with it. *See id.* at 1198-99.

trying to use this case as a vehicle to get a second bite at the *Foster* apple, just months after *certiorari* was denied in *Foster*. (*See* Pet. at 11-14.)

Contrary to the Petition, there is no conflict between *Hudson* and the Court of Appeals' decision in *Foster*, or as the *Foster* decision is incorporated by reference into the Court of Appeals' decision in the instant case. *Hudson* simply does not speak, expressly or impliedly, to the potential liability of a public employer for legal deficiencies in the minute details of the union's compliance with the obligations imposed in that decision. In *Hudson*, this Court affirmed in part the Seventh Circuit's reversal of the district court's judgment, rendered after a bench trial, for the defendants upholding the agency fee procedure. (*See Hudson*, 475 U.S. at 298-301; *Hudson*, 743 F.2d 1187, 1190 (7th Cir. 1984).) This Court did not affirm any judgment of liability against the public employer, since there was no such judgment below. Rather, the Seventh Circuit, whose decision this Court affirmed in part, had reversed the judgment of the district court and remanded the case for further proceedings consistent with its opinion. (*Hudson*, 743 F.2d at 1197.)

Further, there is no indication in this Court's opinion that the public employer ever raised the issue before this Court that is implicated in *Foster* – whether a public employer can incur liability for the deficiencies in the details of the union's compliance with its agency fee obligations merely by the routine deduction of agency fees. Nor does the Court's opinion in *Hudson* decide that issue, either explicitly or implicitly. To be sure, the Court did recite that the public employer accepted the union's calculation of the fair share fee, made the requested fee deductions, and did not provide fee payers with an explanation of the union's calculation or the agency fee procedures. (*See Hudson*, 475 U.S. at 296.)

But the Court's observations on this point were merely set forth in its statement of the underlying facts of the case. The Court nowhere alluded to (much less relied on) these facts in its discussion, nor did it draw any conclusions from them.

In fact, there is virtually nothing in the Court's discussion that even relates to the liability *vel non* of the public employer. To be sure, *Hudson* did state in a footnote, "Since the agency shop itself is a 'significant impingement on First Amendment rights,' *Ellis [v. Railway Clerks]*, 466 U.S. [435] at 455 [(1984)], the government and union have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights." (*Hudson*, 475 U.S. at 307 n.20.) But there can be no contention either in the present case or in *Foster* that such "procedures" did not exist. In both cases, the union had a plan for *Hudson* compliance that addressed all three obligations imposed by that decision: the provision of "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." (*See Hudson*, 475 U.S. at 310.)

The claims in the present case (as in *Foster*) were not that the union did not provide such an explanation, challenge procedure and escrow, but that the *details* of these measures did not fully comply with the union's *Hudson* obligations, e.g., whether the *Hudson* notice that was admittedly sent to fee payers was audited, whether the agency fee challenge procedure established was sufficiently prompt, and whether the portion of the agency fee that was admittedly escrowed

was high enough.[6] Nowhere does *Hudson* hold that the public employer can be held liable for such flaws in the *details* of the union's implementation of its *Hudson* compliance plan, as opposed to a situation in which no such plan exists. And *Foster* is in accord:

> The plaintiffs do not argue that no plan [for *Hudson* compliance] was in place; they have merely demonstrated that they received an inadequate notice. [¶] Although employers certainly owe nonunion member employees the general duty set forth in *Hudson* of ensuring that procedures exist "that minimize impingement and that facilitate a nonunion employee's ability to protect his rights," *Hudson*, 475 U.S. at 307 n.20, they owe no specific duty to employees to ensure that a proper *Hudson* notice is received by each employee before agency fees are deducted.

(*Foster*, 268 F.3d at 694.) Thus, there is no conflict between *Hudson* and *Foster*.

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[6] As Kathryn Libicki testified in her deposition, the public employer did make sure that the union had abided by the plan for *Hudson* compliance:

> [O]ur responsibility was to ensure that in fact [the union] provided those things that I identified and in fact these documents show that they gave notice to the employees. They identified chargeable versus non-chargeable expenses. They set up an escrow account and a procedure for challenge.

ER 170:7-13.

Nor, as a policy matter, would it make sense to require the public employer to police the details of the union's compliance with its *Hudson* obligations. The public employer is particularly ill-suited to intervene in the dispute between the union and its agency fee payers regarding the details of the union's *Hudson* compliance because well-established public policy prohibits public employers from interfering in the internal affairs of the unions that represent their employees. *See, e.g.*, California Government Code §§3519(d), 3543.5(d), §3571(d).

Consistent with these statutory mandates, the California Public Employment Relations Board ("PERB") – the state agency charged with interpreting and enforcing public employment bargaining laws including the foregoing provisions[7] – has promulgated regulations specifying that the union, not the public employer, is responsible for informing the employees of the amount and basis for calculating the agency fee, as well as of the procedure for challenging it. (8 California Code of Regulations § 32992.) Moreover, PERB has also specifically held that imposing such a duty on the employer would conflict with the statutory prohibition on interference with the union's affairs. (*San Ramon Valley Unified School Dist. (Abbot)*, PERB Decision No. 751, 13 P.E.R.C. ¶ 20201 at p. 732 (1989); *accord Sweetwater Union High School District (Gerber)*, PERB Decision No. 1417, 25 P.E.R.C. ¶ 32024 (2001).)

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[7] *See, e.g.*, California Government Code §§ 3541 (establishing PERB); 3541.3(g) (authorizing PERB "to adopt . . . rules and regulations to carry out the provisions and effectuate the purposes and policies of this chapter").

As PERB held in *Abbot*, the position espoused by petitioners here "is incompatible with the entire notion of collective bargaining," because "[t]he 'arm's length' relationship required by collective bargaining recognizes that the employer and the union have conflicting interests" which "obviously render unworkable any scheme where the employer must police the union's actions, lest it be held liable for them." (*Abbot*, 13 P.E.R.C. ¶ 20201 at p. 732.) Moreover, as PERB also recognized, there are "practical reasons why creating such a duty [as to the employer] makes little sense," such as the fact that "[a] public . . . employer simply does not have the authority or resources to review union procedures and determine if they are statutorily or constitutionally adequate." (*Id.*)

The reasoning of *Abbot* is compelling. The public employer's role in the agency fee context is limited to deducting the fees and transmitting them to the unions; the employers retain no more control over the fees than they do over payroll deductions that they may make for the United Way or for other charitable organizations. The unions act alone and in their own interest in determining the purposes for which agency fees shall be spent, the form and content of their *Hudson* notices, and the procedures that comprise the agency fee arbitration and escrow. Moreover, public employers lack the information and expertise to look over the unions' shoulders and review the legality of their agency fee procedures. For these reasons, *Foster*'s holding that a public employer incurs no legal duty to police the details of the union's compliance with *Hudson* merely by making routine agency fee payroll deductions is not only consistent with *Hudson*, but moreover is supported by public policy.

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH OPINIONS FROM THE THIRD AND SIXTH CIRCUITS UPON WHICH PETITIONERS RELY.

Contrary to petitioners' argument, there is no conflict between the Ninth Circuit's resolution of the standing issue and either of the Sixth and Third Circuit decisions on which plaintiffs rely, *Weaver v. Univ. of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992), and *Hohe v. Casey*, 956 F.2d 399 (3d Cir. 1992). Neither of those cases expressly addressed the standing issue.[8] Although petitioners cite authority to the effect that federal courts have an *obligation* to address standing (*see* Pet. at 22-23), that is a far cry from authority holding that one can assume from a federal court's resolution of the merits of an issue that it has *implicitly* addressed and resolved the standing issue. In fact, settled authority is plainly to the contrary. Thus, the Court has "repeatedly held that the existence of unaddressed jurisdictional defects has *no precedential effect*." (*Lewis v. Casey*, 518 U. S. 343, 352 n. 2 (1996) (emphasis added). *See also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U. S. 89, 119 (1984) (quoting *Hagans v. Lavine*, 415 U. S. 528, 533 n. 5 (1974)) ("'[W]hen

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[8] Contrary to plaintiffs' attempt to portray the district court's decision in *Hohe*, 740 F. Supp. 1092, 1098-99 & n.5, that court did *not* address the issue of fee payers' standing to challenge the agency fee indemnification provision. Rather, that decision held that its resolution of the merits of various of the claims rendered it unnecessary to *reach* the challenge to the indemnification provision. This clearly was not a decision that the plaintiffs lacked *standing* to bring such a challenge, but rather was an express and straightforward application of the jurisprudential rule of avoiding the resolution of constitutional questions that are not necessary to the outcome of the case. (*See id.* at 1098.)

questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issues before us'").)

Second, the same is true of the prior Ninth Circuit case that petitioners cite, *Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 817 (9th Cir. 1997), *cert. denied sub nom Anchorage Educ. Ass'n v. Patterson*, 524 U.S. 904 (1998). In *Knight*, the Ninth Circuit had no occasion to consider whether the agency fee payers had demonstrated sufficient injury, causation, and redressability to establish standing. Instead, *Knight* held the challenge unripe because it was based upon "factual assertions that cannot be assessed on the current record" and because no action had yet been taken against the plaintiff. (*Knight*, 131 F.3d at 814.) The court's statement that the plaintiff's factual assertions were incapable of assessment demonstrates that the standing question, which depended upon such facts, could not have been resolved in that case. Moreover, plaintiffs in the present case acknowledged in the Ninth Circuit that the standing issue was not raised at all on appeal in *Knight*. (*See* Appellants' Opening Ninth Circuit Brief at 33, n. 10.) As such, *Knight* cannot be considered to have any precedential effect with regard to the standing issue, under the authority cited in the prior paragraph.

III. WHATEVER CONFLICT EXISTS BETWEEN THE COURT OF APPEALS' DECISION AND THE TENTH CIRCUIT'S OPINION IN *WESSEL* IS INSUFFICIENT TO WARRANT REVIEW.

Petitioners' final claim of a conflict that would justify this Court's review is the juxtaposition of this case with the Tenth Circuit's 2 to 1 opinion in which the majority reached

a different conclusion for the wrong reasons: *Wessel v. City of Albuquerque*, 299 F.3d 1186 (10th Cir. 2002).

Wessel did not, however, consider and reject the Ninth Circuit's decision from which plaintiffs now seek *certiorari*. Rather, *Wessel* considered only the prior Ninth Circuit decision in this case, which was vacated. *(See Wessel*, 299 F.3d at 1199 n.3.) Further, since the conflict is only at present between two circuits, the Court should permit other circuits an opportunity to consider the issue, because "experience with conflicting interpretations of federal rules [of law] may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process." (Justice Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177, 183 (1982); *see also id.* ("The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result").)

As Justice Stevens also observed in *McCray v. New York*, 461 U.S. 961, 962 (1983), in which the Court denied a petition for a writ of *certiorari*, "[F]urther consideration of the substantive and procedural ramifications of the problem by other courts will enable [the Supreme Court] to deal with the issue more wisely at a later date."

Moreover, *Wessel*'s resolution of the standing issue is pure *ipse dixit* and on its face reveals the fatal flaw in its analysis. The majority opinion's discussion of the standing issue, which consists merely of a one paragraph footnote, reads as follows in its entirety:

> A previous Ninth Circuit panel declined to reach the issue presented in this case, concluding that the objecting employee lacked

> standing because "[w]hile it can be assumed that [he] suffered some injury when the fees were deducted from his paycheck . . . . He certainly cannot show any connection between the indemnification agreement and that injury." (*Prescott v. County of El Dorado*, 177 F.3d 1102, 1112 (9th Cir. 1999), *vacated on other grounds*, 528 U.S. 1111, 120 S.Ct. 929, 145 L.Ed.2d 807 (2000).) Although standing has not been raised as an issue by the parties in this case, we disagree with the Ninth Circuit's analysis. The alleged injury results from the indemnification provision's negation of any incentive for the City to ensure that the *Hudson* requirements were followed. The nonmembers' entire argument presumes that, if the City faced potential liability, it would have prevented the fair share fees from being deducted unconstitutionally from the non-members' paychecks.

(*Wessel*, 299 F.3d at 1199 n.3.)

The crux of the *Wessel* majority's resolution of the standing issue is contained in the final sentence quoted above, "The nonmembers' entire argument *presumes* that, if the City faced potential liability, it would have prevented the fair share fees from being deducted unconstitutionally from the non-members' paychecks." (*Id.*; emphasis added.) The fatal flaw in this analysis is apparent: it is the plaintiffs' burden to *prove* their standing, not merely to presume it:

> The party invoking federal jurisdiction bears the burden of establishing the[] elements [of standing]. *See FW/PBS, Inc. v. Dallas*, 493

U.S. 215, 231 (1990); *Warth* [*v. Seldin*, 422 U. S. 490], 508 [(1975)]. Since they are not mere pleading requirements, but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 883-889 (1990); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 114-115, and n. 31 (1979); *Simon* [*v. Eastern K. Welfare Rights Organization*, 426 U.S. 26], 45, n. 25 [(1976)]; *Warth*, *supra*, at 527, and n. 6 (Brennan, J., dissenting). At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss, we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *National Wildlife Federation*, *supra*, at 889. In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial." *Gladstone*, *supra*, at 115, n. 31.

(Lujan v. Defenders of Wildlife, 504 U. S. 555, 561 (1992).)

The *Wessel* decision, which reviewed a summary judgment, neither cites nor analyzes any "specific facts," set forth "by affidavit or other evidence" (*id.*) proffered by the plaintiffs to satisfy their burden of proof as to standing, i.e., any evidence that the City would have ceased deducting fair share fees absent the indemnification provision. Instead, the Tenth Circuit does precisely what the Supreme Court has held cannot be done: it *presumes* standing on the basis of "mere allegations." *Id.* The Tenth Circuit's error as to the standing inquiry was most likely influenced by the absence of any briefing by the parties on that issue, as the court noted that "standing ha[d] not been raised as an issue by the parties in th[e] case." (*Wessel*, 299 F.3d at 1199 n.3.) A preferred, if not the *proper*, procedure would have been for the court to request briefing on that issue, rather than decide it without the benefit of briefing. (*See, e.g., Arizonans for Official English v. Arizona*, 517 U.S. 1102 (1996) (directing the parties to brief the issue of whether "petitioners have standing to maintain this action," in "addition to the questions presented by the petition [for *certiorari*]").)

In light of the aforementioned errors surrounding the *Wessel* opinion, it is entirely possible that permitting this issue to "percolate" in the lower courts will obviate the need for this Court to resolve any perceived conflict between *Prescott II* and *Wessel*, because circuits which consider this issue in the future may likely note these palpable errors in *Wessel*.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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